

**NOTICE OF FINAL RULEMAKING**  
**TITLE 2. ADMINISTRATION**  
**CHAPTER 8. STATE RETIREMENT SYSTEM BOARD**

**PREAMBLE**

1. 

<b><u>Sections Affected</u></b>	<b><u>Rulemaking Action</u></b>
Article 7	New Article
R2-8-701	New Section
R2-8-702	New Section
R2-8-703	New Section
R2-8-704	New Section
R2-8-705	New Section
R2-8-706	New Section
R2-8-707	New Section
R2-8-708	New Section
R2-8-709	New Section
2. **The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**  
  
Authorizing statute: A.R.S. § 38-714(F)(5)  
Implementing statute: A.R.S. §§ 38-735, 38-736, 38-737, 38-738
3. **The effective date of the rules:**  
  
These rules become effective upon filing with the Secretary of State. This immediate effective date is allowed under A.R.S. § 41-1032(A)(4), which allows a rule to become effective immediately when it provides a benefit to the public and a penalty is not associated with a violation of the rule. It is a benefit to the public to have current, up-to-date rules that provide current procedures for identifying contributions not withheld. These rules do not impose any additional requirements upon the public, and there is no penalty associated with the violation of the rules.
4. **A list of all previous notices appearing in the Register addressing the final rules:**  
  
Notice of Docket Opening: 11 A.A.R. 3255, August 26, 2005; 12 A.A.R. 836, March 17, 2006  
Notice of Proposed Rulemaking: 12 A.A.R. 2802, August 11, 2006
5. **The name and address of agency personnel with whom persons may communicate regarding the rules:**

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or

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**6. An explanation of the rules, including the agency's reasons for initiating the rules:**

A.R.S. § 38-736 provides when member contributions are to begin. A.R.S. §§ 38-736 and 38-737 provide how employer and member contributions are paid. A.R.S. § 38-735 provides when interest is charged on contributions, and A.R.S. § 38-738 identifies what happens if less than the correct amount of employer or member contributions are made. This rulemaking specifies how the ASRS handles claims that required contributions were not withheld, including the procedure for:

1. Notifying ASRS that less than the correct amount of contributions may have been paid into ASRS by an employer,
2. Determining whether less than the correct amount of contributions has been paid into ASRS by an employer,
3. Determining the amount of contributions that shall be paid into the ASRS,
4. Disputing ASRS determinations involving contributions not withheld, and
5. Specifying how the contributions shall be paid into ASRS.

**7. A reference to any study relevant to the rules that the agency reviewed and either relied on in its evaluation of or justification for the rules or did not rely on in its evaluation of or justification for the rules, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

The agency did not review any study relevant to the rules.

8. **A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant authority of a political subdivision of this state:**

Not applicable

9. **The summary of the economic, small business, and consumer impact:**

Annual costs/revenues changes are designated as minimal when less than \$1,000, moderate from \$1,000 to \$10,000, and substantial when more than \$10,000 in additional costs or revenues.

The ASRS will bear moderate to substantial costs for promulgating and enforcing the rules.

Costs for promulgating the rules include staff time to write, review, and direct the rules through the rulemaking process.

The cost to an ASRS employer and to a member will depend on the number of incidences where required contributions were not withheld, the salary of the member involved, the length of time involved, how long it's been since the contributions should have been withheld, and how long the employer and member take to pay the contribution amount. However, these costs are accrued based on statutory requirements. During fiscal year 2006, 1750 Contributions Not Withheld claims were processed. None of the final decisions were appealed. The rules benefit both the employers and the members because the rules provide a consistent process for identifying and paying for contributions that should have been previously withheld, but were not.

10. **A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):**

1. The title of R2-8-708 in the table of contents was changed from "Dispute of Credited Service" to "Dispute of an ASRS Determination Regarding Contributions Not Withheld" to make it consistent with the title in the rule. The title in the rule is a clearer description of the contents of the rule, and is not a substantial change.
2. In R2-8-702(A) the rule identified as R2-8-703(A)(1) was changed to R2-8-704(A)(1). The number "3" in the citations was a typographical error, and is not a substantial change.
3. In R2-8-706(B), the citation "A.R.S. § 38-748" was removed because the statute was repealed, and the citation "A.R.S. § 38-766" was changed to "A.R.S. § 38-766.01" because of a typographical error. These are not substantial changes.
4. Minor technical and grammatical changes were made at the suggestion of GRRC staff.

11. **A summary of the comments made regarding the rules and the agency response to them:**

None

12. **Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:**

Not applicable

13. **Incorporations by reference and their location in the rules:**

Not applicable

14. **Were these rules previously made as emergency rules?**

No

15. **The full text of the rules follows:**

**TITLE 2. ADMINISTRATION**  
**CHAPTER 8. STATE RETIREMENT SYSTEM BOARD**  
**ARTICLE 7. CONTRIBUTIONS NOT WITHHELD**

**Section**

<u>R2-8-701.</u>	<u>Definitions</u>
<u>R2-8-702.</u>	<u>General Information</u>
<u>R2-8-703.</u>	<u>ASRS Employer's Discovery of Error</u>
<u>R2-8-704.</u>	<u>Member's Discovery of Error</u>
<u>R2-8-705.</u>	<u>ASRS' Discovery of Error</u>
<u>R2-8-706.</u>	<u>Determination of Contributions Not Withheld</u>
<u>R2-8-707.</u>	<u>Submission of Payment</u>
<u>R2-8-708.</u>	<u>Dispute of an ASRS Determination Regarding Contributions Not Withheld</u>
<u>R2-8-709.</u>	<u>Nonpayment of Contributions</u>

**TITLE 2. ADMINISTRATION**  
**CHAPTER 8. STATE RETIREMENT SYSTEM BOARD**  
**ARTICLE 7. CONTRIBUTIONS NOT WITHHELD**

**R2-8-701. Definitions**

The following definitions apply to this Article unless otherwise specified:

1. “218 agreement” means a written agreement between the State, political subdivision, or political subdivision entity and the Social Security Administration, under the provisions of §218 of the Social Security Act, to provide social security and Medicare or Medicare-only coverage to employees of the State, political subdivision, or political subdivision entity.
2. “Active member” has the same meaning as in A.R.S. § 38-711.
3. “ASRS” has the same meaning as in A.R.S. § 38-711.
4. “ASRS employer” means this state, a political subdivision, or a political subdivision entity that has:
  - a. Signed a 218 agreement.
  - b. Applied to become a member of ASRS, and
  - c. Been approved for membership by the Board.
5. “Authorized employer representative” means an individual who has legal power to bind the ASRS employer in its transactions with the ASRS.
6. “Board” has the same meaning as in A.R.S. § 38-711.
7. “Director” means the Director appointed by the Board as provided in A.R.S. § 38-715.
8. “Documentation” means a pay stub, completed W-2 form, completed Verification of Contributions Not Withheld form, employer letter or spreadsheet, completed State Personnel Action Form, Social Security Earnings Report, employment contract, payroll record, timesheet, or other ASRS employer-provided form that includes:
  - a. Whether the employee was covered under the ASRS employer’s 218 agreement,
  - b. The number of hours worked or length of time the member was employed by the ASRS employer, or
  - c. The compensation paid to the member by the ASRS employer.
9. “Eligible service” means employment with an ASRS employer:
  - a. That is no more than 15 years before the date the ASRS receives written credible evidence that less than the correct amount of contributions were paid into the

ASRS or the ASRS otherwise determines that less than the correct amount of contributions were made as specified in A.R.S. § 38-738(C); and

b. In which the member:

- i. Until 6/30/92, worked a minimum of 20 hours per week for at least 5 months in a fiscal year for any one or more ASRS employers;
- ii. From 7/1/92 to 7/1/99, worked a minimum of 20 hours per week for at least 20 weeks in a fiscal year for any one or more ASRS employers; or
- iii. From 7/1/99 to the present, worked a minimum of 20 hours per week for at least 20 weeks in a service year for at least one ASRS employer.

10. "Fiscal year" means from July 1 of one year through June 30 of the next year.

11. "Member" has the same meaning as in A.R.S. § 38-711.

12. "Person" has the same meaning as in A.R.S. § 1-215.

13. "Political subdivision" has the same meaning as in A.R.S. § 38-711.

14. "Political subdivision entity" has the same meaning as in A.R.S. § 38-711.

15. "Service year" has the same meaning as in A.R.S. § 38-711.

**R2-8-702. General Information**

A. Verified eligible service that occurred more than 15 years before the date ASRS receives the information identified in R2-8-704(A)(1) is considered public service credit as provided in A.R.S. § 38-738(D), and is not applied under this Article.

B. The ASRS employer shall pay the ASRS employer's portion of the contributions the ASRS determines is owed under R2-8-706 whether or not:

- 1. The member has withdrawn contributions as specified in R2-8-115; or
- 2. The member pays the member's portion of the contributions.

C. The person who initiates the claim that contributions were not withheld for eligible service has the burden to prove a contribution error was made.

D. ASRS shall not waive payment of contributions or interest owed under this Article.

E. If a member is not able to establish eligibility for service credit for which contributions were not withheld, but is able to establish a period of employment by an ASRS employer the member may request to purchase service credit for that period under A.R.S. § 38-743 and Article 5 of this Chapter.

**R2-8-703. ASRS Employer's Discovery of Error**

If an ASRS employer determines that contributions have not been withheld for a member for a period of eligible service, the ASRS employer shall notify ASRS in writing, and shall provide ASRS with the member's full name, social security number, months, years, and hours per week

worked, the compensation each fiscal year for the time periods worked, and the member's position title and status at the time contributions should have been withheld.

**R2-8-704. Member's Discovery of Error**

- A. If a member believes that an ASRS employer has not withheld contributions for the member for a period of eligible service, the member shall:
1. Provide the ASRS employer with documentation of the member's claim and request that the ASRS employer provide a letter that includes the information in the Verification of Contributions Not Withheld form or complete a Verification of Contributions Not Withheld form that includes:
    - a. The member's full name;
    - b. Other names used by the member;
    - c. The member's social security number;
    - d. Whether the position was covered under the ASRS employer's 218 agreement;
    - e. The position title the member held at the time the contributions should have been withheld;
    - f. The eligibility of the member at the time the contributions should have been withheld;
    - g. The following statements of understanding and agreements to be initialed by the authorized employer representative filling out the form:
      - i. I understand it is my responsibility to verify the accuracy of the information I am providing on this form. I understand any individual who knowingly makes a false statement, or who falsifies or permits to be falsified any record of the ASRS with an intent to defraud the ASRS, is guilty of a Class 6 felony pursuant to A.R.S. § 38-793; and
      - ii. I understand that, based on the information provided on this form, the ASRS may determine that contributions are owed on behalf of the member listed on this form, and the ASRS employer may incur a substantial financial obligation;
    - h. The months worked, the hours per week worked, and the compensation earned by the member, by fiscal year;
    - i. The name of the ASRS employer;



- j. The printed name and signature of the authorized employer representative;
- k. The daytime telephone number of the authorized employer representative;
- l. The title of the authorized employer representative; and
- m. The date the authorized employer representative signed the form;
- 2. Provide the ASRS with the completed Verification of Contributions Not Withheld form; and
- 3. If the ASRS employer refuses to fill out the Verification of Contributions Not Withheld form, or if the member disputes the information the ASRS employer completes on the form, provide the ASRS with the documentation the member believes supports the allegation that contributions should have been withheld, that includes proof:
  - a. That the employee was covered under the ASRS employer's 218 agreement.
  - b. Of the number of hours worked,
  - c. Of the length of time the member was employed by the ASRS employer, and
  - d. Of the compensation paid to the member by the ASRS employer.

**R2-8-705. ASRS' Discovery of Error**

If the ASRS determines, as specified in A.R.S. § 38-738(B)(7), that contributions have not been withheld for a member for a period of eligible service, the ASRS shall notify the member and the ASRS employer in writing and shall request the following information:

- 1. The months, years and hours per week worked,
- 2. The compensation earned by the member each fiscal year for the time periods worked; and
- 3. The member's position title at the time contributions should have been withheld.

**R2-8-706. Determination of Contributions Not Withheld**

- A. Upon receipt of the information listed in R2-8-703, R2-8-704, or R2-8-705, the ASRS shall review the information to determine whether or not member contributions should have been withheld by the ASRS employer, the length of time those contributions should have been withheld, and the amount of contributions that should have been withheld.

- B. Except for returning to work under A.R.S. § 38-766.01, the presence of a contract between a member and the ASRS employer does not alter the contribution requirements of A.R.S. §§ 38-736 and 38-737.
- C. If there is any discrepancy between the documentation provided by the ASRS employer and the documentation provided by the member, a document used in the usual course of business prepared at the time in question is controlling.
- D. The ASRS shall provide to the ASRS employer and the member a written statement that includes:
1. The dates of eligible service for which contributions were not withheld,
  2. The dollar amount of contributions that should have been made,
  3. The dollar amount of the contributions to be paid by the ASRS employer,
  4. The interest on the ASRS employer contributions and member contributions to be paid by the ASRS employer,
  5. The dollar amount of contributions to be paid by the member, and
  6. To the member, the various payment options that may apply, as specified in R2-8-512 through R2-8-519.

**R2-8-707. Submission of Payment**

- A. Within 90 calendar days after the ASRS notifies the ASRS employer in writing of the amount due, the ASRS employer shall pay all ASRS employer contributions, including accrued interest on both the ASRS employer and member contributions, from the date the the contributions were due to the date the ASRS notifies the ASRS employer of the amount due. An ASRS employer who makes payment under A.R.S. § 38-738(B)(3) is not liable for additional interest that may accrue as a result of a member's failure to remit payment required by A.R.S. § 38-738(B)(1). If the ASRS does not receive full payment of the ASRS employer's amount due within 90 calendar days after the ASRS notifies the ASRS employer of the amount due, interest on the amount not paid, as provided in A.R.S. § 38-738(B)(3), will accrue from the 91<sup>st</sup> day until the ASRS employer pays the full amount.
- B. An ASRS employer may pay the amount the ASRS employer believes may be due at any time before ASRS's notification of the amount due in order to prevent the accrual of interest after the date of the payment. Any amount the ASRS employer pays that the ASRS determines is not owed shall be refunded to the ASRS employer.
- C. A member may purchase eligible service for which contributions were not withheld in accordance with the requirements of Article 5 of this Chapter for purchase of service

credit. If the ASRS does not receive full payment of the ASRS employee's amount due within 90 calendar days after the ASRS notifies the member that the ASRS received the ASRS employer's full payment, interest on the amount not paid, as provided in A.R.S. § 38-738(B)(1), will accrue from the 91<sup>st</sup> day until the member pays the full amount.

**R2-8-708. Dispute of an ASRS Determination Regarding Contributions Not Withheld**

- A. If a member or the ASRS employer disputes an ASRS determination regarding contributions not withheld, that party may request in writing that the Director review the ASRS determination. Within 30 calendar days of receiving the request for the review of the ASRS determination, the Director shall review and either approve or amend the ASRS determination, and send to the member and the ASRS employer written notice of the Director's decision.
- B. If the member or the ASRS employer disputes the Director's decision, that party may obtain a hearing by filing a Request for a Hearing with the Board, in accordance with Article 4 of this Chapter, within 30 calendar days after receiving notice of the Director's determination. The party filing the request shall provide the name of the other party.
- C. The burden of producing evidence is on the party challenging the determination.
- D. If the ASRS Board determines that the service is eligible, the ASRS shall send both the ASRS employer and the member a written statement, as specified in R2-8-706(D), and the:

  - 1. Decision of the Board;
  - 2. Correct amount due as determined by the Board, if applicable;
  - 3. Additional amount of interest due from the losing party, from the 91<sup>st</sup> day after the initial notification of the amount due to the date of the decision; and
  - 4. Notification that interest shall continue to accrue on the total amount due at the rate specified in A.R.S. § 38-738(B) until the date payment is received by the ASRS.
- E. If the ASRS Board determines that the service is not eligible, ASRS shall send both the ASRS employer and the member the decision of the Board.

**R2-8-709. Nonpayment of Contributions**

- A. A member receives service credit only for the portion of service the ASRS has determined is eligible and that the member has paid for.
- B. A member does not receive service credit until both the ASRS employer and member portions of the contributions have been paid.

C. If the ASRS employer does not pay, the ASRS shall take any steps legally authorized to collect payment. Any steps the ASRS may take to collect payment are separate from any action a member may elect to take against the ASRS employer.